A

ISHAK HJ SHAARI

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
AZMEL MAAMOR JCA
MOHD NOOR ABDULLAH JCA
[CRIMINAL APPLICATION NO. M-07-19-2005]

C

14 FEBRUARY 2006

CRIMINAL PROCEDURE: *Jurisdiction of court - Court of Appeal - Whether r. 76 Rules of the Court of Appeal 1994 empowered court to set aside order of High Court and restore original order of magistrate - Inherent jurisdiction of court - Interests of justice - Courts of Judicature Act 1964, s. 50(2)*

D

CRIMINAL PROCEDURE: *Appeal - Leave to appeal to Court of Appeal - Whether there were issues of law - Whether requirements of s. 50(2) Courts of Judicature Act 1964 satisfied*

E

The applicant, convicted by the magistrate's court for having outraged the modesty of a 14-year old schoolgirl contrary to s. 354 of the Penal Code, was sentenced to a term of four years imprisonment and two strokes of the rottan. The applicant

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appealed against his conviction and sentence to the High Court, the main ground of contention being that the learned magistrate had failed to consider that the version given by the applicant in his evidence was consistent with that given in the cautioned statement that was recorded from him, and that both were

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consistent with his innocence. It was also argued before the High Court that the applicant's conviction should be quashed because the prosecution had failed to challenge the applicant's evidence as to his account of the events. The High Court rejected both complaints but intervened on the issue of sentence, reducing the

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term of imprisonment to two years and setting aside the whipping. The applicant then moved this court for leave to appeal pursuant to s. 50(2) of the Courts of Judicature Act 1964 ('the Act'), framing two questions in respect of the two complaints made before the High Court.

I

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

(1) The questions framed by the applicant and said to have arisen out of the judgment of the High Court acting as the court of intermediate appeal were not questions of law at all. They were merely questions of fact that had to do with the alleged failure on the part of the magistrate's court to undertake a judicial appreciation of the evidence before that court. The issue whether a trial court judicially appreciated the evidence before it was one that related to a misdirection on the facts and the evidence and was, therefore, not an issue of law. Accordingly, the requirements of s. 50(2) of the Act were not satisfied. (para 2)

(2) However, the learned judge erred in altering the sentence imposed by the learned magistrate. The original sentence of four years imprisonment and whipping imposed by the magistrate was not manifestly excessive having regard to the facts of this case. This was a case where the accused had used his position as a religious teacher to attempt to satisfy his carnal desires, a very serious offence by its very nature aggravated by the circumstances in which it was committed. Hence, the learned judge's order altering sentence was, with respect, flawed because the sentence imposed by the magistrate was not manifestly excessive having regard to the public interest. A manifest injustice had occurred at the intermediate appellate level. (para 3)

(3) When the High Court heard and made its orders on the appeal, it was merely acting in continuation of the trial. Hence, it was clear beyond a peradventure that when an application was made to this court under s. 50(2) of the Act, the powers exercisable by this court included all those powers exercisable by the High Court by virtue of the Criminal Procedure Code in an appeal or revision brought before that court. Accordingly, if this court when moved for leave to appeal under s. 50(2) of the Act, is satisfied in any given case that the High Court ought not to have disturbed an order made by a sessions judge or magistrate it is perfectly entitled, when refusing leave, to correct the position and to remedy any injustice. Therefore, this court was well empowered to make the orders it made on the application by the applicant. (para 13)

(4) Alternatively, this court, as a superior court of record, has an inherent jurisdiction to make such orders as are in the interests of justice without regard to technicalities although there are limitations to the use by any court of record of its inherent jurisdiction. This case cried out for justice. So, even if this court's interpretation of r. 76 of the Rules of the Court of Appeal 1994 ('the Rules') were wrong, it may safely rely on this court's inherent jurisdiction to sustain its order restoring the sentence passed by the magistrate's court. (para 14)

Per Mohd Noor Abdullah JCA:

(1) A muta'a marriage such as that purportedly performed by the applicant was, in this country, prohibited; it was unlawful, invalid and not recognized. It was under these circumstances and the exceptional facts of this case that the sentence imposed by the learned magistrate was restored by virtue of this court's exercise of the powers vested in it under r. 76 of the Rules. (paras 19 & 20)

Bahasa Malaysia *translation of headnotes*

Di mahkamah majisteret, pemohon telah disabit dengan kesalahan di bawah s. 354 Kanun Keseksaan kerana mencabul kehormatan seorang pelajar sekolah berumur 14 tahun dan dihukum empat tahun penjara dan dua sebatan. Pemohon merayu terhadap sabitan dan hukuman atas alasan bahawa yang arif majisteret gagal mempertimbang bahawa versi keterangannya adalah konsisten dengan percakapan beramaran yang direkod darinya, di mana kedua-duanya itu adalah konsisten dengan ketidak-bersalahan beliau. Juga dihujahkan bahawa sabitan harus dibatalkan oleh kerana pendakwaan gagal mencabar keterangannya mengenai urutan peristiwa yang berlaku. Mahkamah Tinggi menolak kedua-dua rungutan. Mahkamah, bagaimanapun, campur tangan atas perkara hukuman sekaligus meringankan hukuman kepada dua tahun penjara tanpa sebatan. Berikutnya, pemohon memohon kepada mahkamah semasa untuk kebenaran merayu di bawah s. 50(2) Akta Mahkamah Kehakiman 1964 ('Akta'), sambil mengajukan dua persoalan yang menjadi asas rungutan beliau di hadapan Mahkamah Tinggi.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

(1) Persoalan yang dirangka pemohon yang dikatakan sebagai berbangkit dari keputusan Mahkamah Tinggi yang bertindak sebagai mahkamah rayuan perantaraan sama sekali bukan

merupakan persoalan undang-undang. Ia adalah persoalan fakta yang menyangkuti dakwaan kegagalan di pihak mahkamah majisteret untuk membuat pertimbangan kehakiman atas keterangan-keterangan yang ada di hadapan mahkamah itu. Soal sama ada sebuah mahkamah bicara telah menimbang keterangan dengan secara kehakiman adalah menyentuhi soal salah arahan di atas fakta dan keterangan, dan oleh itu bukan isu undang-undang. Dengan itu, kehendak s. 50(2) Akta telah tidak dipenuhi.

(2) Bagaimanapun, yang arif hakim khilaf apabila meminda hukuman yang dijatuhkan oleh majisteret. Mengambil kira fakta kes, hukuman asal empat tahun penjara dan sebatan yang dijatuhkan oleh majisteret tidaklah terlalu berat. Ini adalah kes di mana tertuduh menggunakan kedudukannya sebagai seorang guru agama untuk cuba memuaskan nafsu syahwatnya, yang mana ia merupakan satu kesalahan serius, sementelah dengan melihat kepada suasana dan halkeadaan di mana kesalahan tersebut dilakukan. Oleh yang demikian, perintah yang arif hakim meminda hukuman adalah cacat, kerana hukuman yang dijatuhkan oleh majisteret tidaklah terlampau berat, mengambil kira faktor kepentingan awam. Adalah nyata bahawa suatu ketidakadilan telah berlaku di peringkat rayuan perantaraan.

(3) Mahkamah Tinggi, apabila mendengar dan membuat keputusan atas rayuan, hanya bertindak menyambung perbicaraan. Ianya dengan itu jelas bahawa, bilamana suatu permohonan dibuat ke mahkamah ini di bawah s. 50(2) Akta, kuasa-kuasa yang boleh dilaksanakan oleh mahkamah ini adalah merangkumi semua kuasa-kuasa yang boleh dilaksanakan oleh Mahkamah Tinggi di bawah Kanun Prosedur Jenayah dalam perkara-perkara rayuan atau semakan yang dibawa ke mahkamah tersebut. Oleh yang demikian, jika mahkamah ini, dalam perkara permohonan kebenaran untuk merayu di bawah s. 50(2) Akta, berpuashati bahawa Mahkamah Tinggi, dalam kes yang berbangkit, tidak seharusnya mengganggu perintah yang dibuat oleh hakim sesyen atau majisteret, maka tidaklah salah bagi mahkamah ini, apabila menolak kebenaran, untuk memperbetulkan keadaan ataupun menghapuskan ketidakadilan yang wujud. Ianya mengikut bahawa mahkamah ini berkuasa untuk membuat perintah seperti yang dibuat dalam permohonan pemohon di sini.

A **(4)** Secara alternatif, sebagai mahkamah yang lebih tinggi, mahkamah ini mempunyai bidangkuasa semulajadi untuk membuat perintah-perintah demi kepentingan keadilan tanpa perlu terikat dengan perkara-perkara teknikal, walapupun bidangkuasa tersebut ada hadnya. Dalam kes semasa, tuntutan
B keadilan memang tidak dipenuhi. Dengan demikian, jikapun mahkamah ini khilaf dalam mentafsir k. 76 Kaedah-kaedah Mahkamah Rayuan 1994 ('Kaedah-kaedah'), ia masih boleh bergantung kepada bidangkuasa semulajadinya bagi menyandarkan keputusannya untuk mengekal hukuman yang
C dibuat oleh mahkamah majisteret.

Oleh Mohd Noor Abdullah HMR:

(1) Perkahwinan muta'a seperti yang didakwa telah dilakukan oleh pemohon adalah dilarang di negara ini; ia adalah tak sah, batal
D dan sama sekali tidak diiktiraf. Fakta dan suasana luar biasa ini adalah faktor yang diambil kira apabila mahkamah ini memutuskan untuk melaksanakan kuasanya di bawah k. 76 Kaedah-kaedah sekaligus mengekalkan hukuman yang
E dijatuhkan oleh yang arif majisteret.

Case(s) referred to:
Balasingam v. PP [1959] MLJ 193 ***(refd)***
Bansi Lal v. Emperor [1907] 12 CWN 438 ***(refd)***
Msimanga Lesaly v. PP [2005] 4 MLJ 314 ***(refd)***
F *Queen-Empress v. Jabanulla [1896] 23 ILR 23 Cal 975* ***(refd)***
PP v. Amir Mahmood [1996] 5 MLJ 159 ***(refd)***
Ranjit Singh v. State AIR [1952] HP 81 ***(refd)***
Re Bali Reddy [1913] ILR 37 Mad 119 ***(refd)***

Legislation referred to:
G Courts of Judicature Act 1964, s. 50(2)
Penal Code, s. 354
Rules of the Court of Appeal 1994, r. 76
Rules of the Supreme Court 1980, r. 120

For the appellant - Muhammad Shafee Abdullah (Badrul Munir Bukhari
H *with him); M/s Karpal Singh & Co*
For the respondent - Meor Hashimi Abdul Hamid

[Appeal from High Court, Melaka; Criminal Appeal No: MT2-41-20-2004]

Reported by Suresh Nathan
I

JUDGMENT

Gopal Sri Ram JCA:

[1] The applicant was convicted by the magistrate's court in Melaka for having outraged the modesty of a 14 year old schoolgirl contrary to s. 354 of the Penal Code. He was sentenced to a term of four years imprisonment and ordered to suffer 2 strokes of the rottan. The applicant then appealed against his conviction and sentence to the High Court. The main ground of appeal was that the learned magistrate had failed to consider that the version given by the applicant in his evidence was consistent with that given in the cautioned statement that was recorded from him and that both were consistent with his innocence. The High Court rejected that argument. It applied the judgment of this court in *Msimanga Lesaly v. Public Prosecutor* [2005] 4 MLJ 314 where the trial judge had excluded the exculpatory cautioned statement of the accused and refused to consider it altogether on the ground that it was prejudicial to her co-accused. We held that this omission by the judge was not fatal. And we said this:

> The degree of credence that a court is reasonably expected to assign to a particular version of events depends on the facts and circumstances of each case. And, the mere fact that an accused's evidence is consistent with his or earlier out of court statements does not require a court in every case to hold that he or she is a witness of truth. Were it otherwise, the assessment of oral testimony would become a robotic function. But the judicial appreciation of evidence is a human and not a robotic function. There are no fixed rules about it: only general guidelines. That much is made clear by numerous judgments of our courts.

[2] It was also urged before the High Court that the applicant's conviction should be quashed because the prosecution had failed to challenge the applicant's evidence as to his account of the events. The High Court also rejected that complaint. But it intervened on the issue of sentence. It reduced the term of imprisonment from four to two years and set aside the sentence of whipping. The applicant then moved this court for leave to appeal pursuant to s. 50(2) of the Courts of Judicature Act 1964 ("the Act"). Two questions were framed in respect of the two complaints made before the High Court. Having very carefully examined the motion and the affidavits filed in support, we were satisfied that the questions framed by the applicant and said to have arisen out of the judgment of the High Court acting as the court of intermediate appeal are not questions of law at all. They

A are merely questions of fact that have to do with the alleged failure on the part of the magistrate's court to undertake a judicial appreciation of the evidence before that court. The issue whether a trial court judicially appreciated the evidence before it is one that relates to a misdirection on the facts and evidence and is therefore B not an issue of law. Accordingly, the requirements of s. 50 (2) of the Act were not satisfied. We were unanimous in deciding to dismiss the application.

[3] However, having read and re-read the motion paper provided C to us, we were satisfied that the learned judge erred in altering the sentence imposed by the learned magistrate. We formed the view that the original sentence of four years imprisonment and whipping imposed by the magistrate was not manifestly excessive having regard to the facts of this case. Here you have an accused D who is an Ustaz or religious teacher to whom the victim's parents had entrusted their 14 year old child – their daughter. Based on the concurrent findings made by the courts below, the accused took the victim to his home where, after inviting her to join him in prayer, he purported to undergo a summary marriage ceremony E with her. Thereafter, the applicant took the preparatory steps to having sexual intercourse with the child. He fondled her. When she refused to have intercourse, he placed a copy of the Koran on the victim's head and made her swear on the Holy Book that she would not reveal to anyone the events that had happened in F his home. This is therefore glaringly a case where the accused had used his position as a religious teacher to attempt to satisfy his carnal desires. This is accordingly a very serious offence by its very nature aggravated by the circumstances in which it was committed. Hence, the learned judge's order altering sentence G was, with respect, flawed because the sentence imposed by the magistrate was not manifestly excessive having regard to the public interest. In our view a manifest injustice had occurred at the intermediate appellate level. The case cried out for justice.

H **[4]** We therefore drew the attention of counsel for the accused to r. 76 of the Rules of the Court of Appeal 1994 and inquired whether that rule on its proper construction empowered us to intervene and restore the sentence imposed by the magistrate. He submitted that the rule did not empower us to do so and that if I we acted under that rule, we would be embarking on an illegal procedure. Both he and his client would not participate in such an illegal proceeding. In the light of the stand counsel took, this court through our learned brother Mohamed Noor Abdullah JCA,

explained to the applicant that we proposed to restore the sentence imposed by the magistrate and allowed him an opportunity to be heard. He too, on the advice of counsel, elected not to say anything to dissuade us. After careful consideration, we set aside the order of the High Court as to sentence and restored the original sentence imposed on the applicant.

[5] Before we deal with whether counsel is correct in his argument, it is necessary to see what r. 76 (the marginal note to which reads "Ancillary powers of the court") says. It says this:

> The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

[6] There are four things we would note about the rule. First, historically speaking, it is a reproduction of r. 120 of the Rules of the Supreme Court 1980 which were formerly known as the Rules of the Federal Court 1980. In 1994, when this court was established, the Rules of the Court of Appeal were passed incorporating *verbatim* almost all the rules in the Rules of the Supreme Court 1980 with some re-numbering. Second, it applies to both appeals and applications. Third, that it is an empowering provision. Fourth, that the powers it may exercise are those vested in the trial judge at any stage, even after the trial.

[7] Counsel argues that the rule does not apply to this case because it employs the phrases "trial" at first instance and "trial judge" and "before, during or after the trial". It does not refer to the powers of the High Court when exercising its appellate function. With respect we do not agree with this submission. Our reasons are as follows.

[8] In the first place, regard must be had to the history of the rule. Some of that history was referred to a moment ago. What needs to be added is this. At the time when the Rules of the Supreme Court 1980 were brought into force, there were only two tiers of courts in Malaysia. They were the High Court and the Supreme Court. With the establishment of this court in 1994, the High Court became the intermediate appellate court in respect of matters that originate in the Subordinate Courts. The right of final appeal in such matters lies to this court whose decision is

made final by the Act. If r. 76 is read in the way counsel wants us to read it, then that would entitle us to exercise the powers referred to by that rule only in cases originating in the High Court and coming to us as the first intermediate filter before finding their way to the Federal Court. Such a restrictive reading of the rule cannot be correct as it ignores the apex function of this court in subordinate court criminal appeals. It is also unrealistic as it ignores the historical background to the rule.

[9] In the second place, counsel's suggestion is really an invitation to us to interpret the rule literally. That is an erroneous approach. The correct approach is the purposive one. The rule is a beneficial piece of subsidiary law. It is aimed at doing justice, which is the primary duty of this – and indeed any other – court. It is a sweeping provision. This court has the jurisdiction and powers conferred on it by the Constitution and the Act. What r. 76 does is to reinforce this court's powers by sweeping into the armoury of powers this court already has, those powers not already mentioned in the Act. As it is a provision whose purpose is the achievement of justice, it must, in accordance with well settled guides to construction be interpreted liberally and not narrowly. Counsel's response to this is that his client will not receive justice if the rule is read so as to empower us to restore the magistrate's orders of punishment. The short answer to this is that justice is not only to the accused but also to the State and to the victim of the crime.

[10] In the third place, counsel's argument overlooks that in the word "trial" in the context of r. 76, having regard to its purpose includes an appeal. As a matter of pure principle, it has been held in a number of decisions concerning criminal cases that an appeal is part of the trial of an offence or a mere continuation of it. In *Queen-Empress v. Jabanulla* [1896] 23 ILR 23 Cal. 975 at p. 977, O'Kinealy J said that an appeal "is not a second trial, but only a continuation of the first trial." This view was followed in the case of *Re Bali Reddy* [1913] ILR 37 Mad 119 where the accused had been charged for murder and rioting but had been convicted by the Sessions Court for offences under s. 304 and 147 of the Indian Penal Code. In dealing with the contention that the appeal was a fresh proceeding, the court comprising of Benson and Sundara Ayyar JJ said: "the present appeal is not a second trial but a continuation of the trial in the Sessions Court." Lastly in *Bansi Lal v. Emperor* [1907] 12 CWN 438, the court held that "an appeal is part of the trial of an offence."

[11] There is one further case of interest that supports the point we make. In *Ranjit Singh v. State* AIR [1952] HP 81, it was argued that those provisions in the Criminal Procedure Code which empower the High Court to reverse an acquittal or act in revision to the prejudice of an accused offended the *autrefrois acquit* and *autrefois convict* principle embodied in the Indian Constitution. The court in rejecting this contention said that:

> an accused cannot be said to have been convicted or acquitted as a result of a judgment passed in the course of 'prosecution and punishment' if that judgment is still open to appeal to a Court of higher jurisdiction. It has therefore been held under the corresponding provisions of Section 403 of the Code that an appeal is not a second trial but only a continuation of the trial in the Sessions Court.

[12] Closer to home, Ismail Khan J (as he then was) in the case of *Balasingam v. Public Prosecutor* [1959] MLJ 193 observed as given:

> An appeal is merely a continuation of proceedings by way of rehearing and litigants as well as the Appellate Court are entitled to know the reasons for the finding.

[13] So, in the instant case, when the High Court heard and made its orders on the appeal to which we have already referred, it was merely acting in continuation of the trial. Hence, it is clear beyond a peradventure that when an application is made to this court under s. 50(2) of the Act, the powers exercisable by us under r. 76 include all those powers exercisable by the High Court by virtue of the Criminal Procedure Code in an appeal or revision brought before that court. Accordingly, if this Court when moved for leave to appeal under s. 50(2), is satisfied in any given case that the High Court ought not to have disturbed an order made by a sessions judge or magistrate it is perfectly entitled, when refusing leave, to correct the position and to remedy any injustice. We are therefore satisfied that we were well empowered to make the orders we did on the application by the applicant. But we would add that the time is perhaps ripe for the Rules Committee to amend r. 76 to reflect our function as a court of second and final appeal in those matters originating before the subordinate courts.

[14] There is an alternative ground on which our order may be sustained. This court as a superior court of record has an inherent jurisdiction to make such orders as are in the interests of justice without regard to technicalities. There are however limitations to

A the use by any court of record of its inherent jurisdiction. It cannot be used when there is an express statutory provision covering the precise subject matter. It must be exercised, to borrow the words of Abdul Malik Ishak J in *Public Prosecutor v. Amir bin Mahmood* [1996] 5 MLJ 159, "fairly, cautiously and rarely B and only when the court considers that the ends of justice require it." We have already set out our reasons earlier in this judgment as to why this case cries out for justice. So, even if we are wrong in our interpretation of r. 76, we are of the opinion that we may safely rely on this court's inherent jurisdiction to sustain our order C restoring the sentence passed by the magistrate's court.

[15] We add by way of postscript that upon application of counsel we directed a stay of the sentence of whipping pending the applicant's attempt to move the Federal Court in this matter D under what counsel said was the inherent jurisdiction of that court. A careful perusal of the Act makes it amply clear that the Federal Court's jurisdiction does not extend to hearing appeals from decisions of this court in criminal or civil matters that originate in a subordinate court. Nevertheless, in the interests of E justice, we considered it appropriate to stay the corporal punishment to enable the applicant to pursue the inherent jurisdiction argument before the Federal Court.

Mohd Noor Abdullah JCA:

F **[16]** I concur fully with the judgement of my learned brother Gopal Sri Ram JCA. However the applicant, being an ustaz, a Muslim scholar and teacher we feel obliged to correct a misconception that a Muslim in our country can perform a muta'a marriage abroad and that such marriage is valid and recognised G according to Muslim Law. A muta'a marriage is a marriage contracted between a male Muslim and a female Muslim, a Jew, a Christian or a fire-worshipper, the former declaring to the latter "I have united myself to thee" or "I have married thee" or words to this effect and by fixing the period of cohabitation for a day, a H month, a year or a fixed term of years and by further specifying the amount of dowry.

[17] In this case the applicant, in a room at his house, no one else being present except the girl, clasped her hand and declared I to her:

> Sahaja aku nikahkan diriku dengan Ramlah binti Mahden dengan mas kahwin RM40 hutang. (Verily I wed myself to Ramlah binti Mahden with a dowry of RM40 deferred).

after which he told the girl to dress up scantily in order for him to consummate the marriage. The girl refused. He coaxed her. She steadfastly refused.

[18] It is observed that by the above declaration the Applicant had purportedly married the girl and thus circumvented the statutory injunction against zina/sexual offences and its punishment in this world and the wrath of God in the hereafter. In so doing the applicant had imitated a marriage which flourished among the Sabeans and Zoroastrians from earlier times which seem to have continued after their conversion to Islam. To-day only the Isna-Ashari Shia, one of the schools of Shia Law, regard muta'a as a valid marriage. Other schools of Shia Law including the Ismaili Shias do not recognize such marriage. Whereas according to Sunni Law which is practiced in our country, muta'a marriage is prohibited by the Prophet Muhammad, peace be upon him. The Sunnis rely on a Tradition reported by Saidina Ali himself "Verily the Prophet prohibited, on the day of the battle of Khaiber, a muta'a marriage which is for a fixed time." There is another Tradition according to which a muta'a marriage was once permitted for three days after which it was forbidden by the Prophet.

[19] It was widely reported a few years ago that our students in Iran and in the Middle East contracted a Temporary Contract of Marriage, a pseudo-name for muta'a marriage. Let it be known that in our country, such marriage is prohibited. It is unlawful, invalid and is not recognized.

[20] It is under these circumstances and the exceptional facts of this case that we feel compelled to uphold justice and to state that whenever we are bestowed with the power to do all things necessary to uphold justice, we must not only say we have such power but we must also exercise such power. Hence by virtue of the powers vested on us under r. 76 of the Rules of the Court of Appeal 1994 we restored the sentence imposed by the learned Magistrate.